

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO No. 333 of 2005

Judgment reserved on:14.11.2006

Date of decision: 28.12.2006

Mohan Singh

Appellant

Versus

Smt.Leela Devi

Respondent.

Coram

The Hon'ble Mr. Justice Deepak Gupta, Judge.

***Whether approved for reporting?*¹**

**For the Appellant: Mr.Bhupender Gupta, Senior Advocate,
With Mr.Janesh Gupta, Advocate**

**For the Respondent: Mr.G.D.Verma, Senior Advocate, with
Mr.B.C.Verma, Advocate**

Deepak Gupta, J.

This appeal under Section 28 of the Hindu Marriage Act (hereinafter referred to as the Act) is directed against the order of the Presiding Officer, Fast Track Court, Shimla, dated 26.7.2005 whereby he has dismissed the petition filed by the husband for grant of divorce.

Brief facts necessary for decision of the case are that the parties, who are Hindus, were married on 10.5.1986 and lived together as husband and wife at

¹ ***Whether the reporters of the local papers may be allowed to see the Judgment?***

village Kalhali, Tehsil and District Shimla till 19.7.1992.

Two children, one son and one daughter, were born out of the wedlock and these children are residing with the wife.

In 1995 the husband had filed a petition for grant of divorce. A decree for divorce was granted in his favour by the learned District Judge, Shimla. Thereafter Leela Devi preferred an appeal in this court which was registered as FAO No. 270 of 1997. The matter was compromised between the parties on 7.1.1998. The appeal was allowed in terms of the compromise. The decree for dissolution of marriage was set aside and the parties had agreed to reside together.

According to the husband, the parties resided together only for about 4 months and on 18.7.1998 when the husband was not at home, the wife left her matrimonial home and started residing with her parents. The husband states that he made efforts to bring back the wife, but to no avail. It is alleged that the wife left the husband without his permission and despite efforts refused to come back and, therefore, she has deserted the husband and is entitled to divorce.

The stand of the wife, on the other hand, is that after the compromise was entered into, the petitioner

did not take any interest in the welfare of the wife and children and on account of his neglect and refusal to keep and maintain the wife and children, she was left with no alternate, but to leave her matrimonial home. It is also alleged that the wife was ill treated by the husband and the members of his family and on account of these acts of cruelty, she had no option, but to take shelter in the house of her parents. According to the wife, she was forced to file proceedings under Section 125 Cr.P.C. since the husband did not make any efforts to maintain her or the children and they were denied the necessities of life, such as food and lodging etc.

On the pleading of the parties, the learned trial court framed the following issues :-

1. Whether the respondent has deserted the petitioner 18th July, 1998 as alleged. If so its effect ? OPA
2. Whether the present petition is not maintainable as alleged ? OPR
3. Whether the petitioner is estopped to file the present petition as alleged ? OPR
4. Whether the present petition is not filed in accordance with law and does not disclose the required particulars. If so, its effect ? OPR
5. Relief.

The parties led evidence and after hearing the arguments, the learned trial court decided issues No. 1 and 4 against the husband and dismissed the petition.

Two questions arise for decision in the case; (i) whether the wife has deserted the husband without any reasonable cause and (ii) whether the present petition is not in accordance with rules framed by the High Court of Himachal Pradesh ?

I propose to deal with the second question first since that goes to the root of the case. At the outset I may mention that the petitioner has sought divorce only on the ground of desertion and there is no allegation of cruelty levelled in the petition. In fact, no issue of cruelty has been framed by the learned trial court. The High Court of Himachal Pradesh has framed the Hindu Marriage and Divorce (Himachal Series) Rules 1983. Rule 6 of the said Rules reads as follows:-

“6.Affidavits.-(1) Every petition under section 13-B of the Act, the grounds of consent for divorce narrated in the petition shall be supported by separate affidavits of the parties stating that the consent has not been obtained by force, fraud or undue influence.

(2)Every petition except petitions under sections 11 and 13-B, shall be accompanied by an affidavit to

the effect that it is not presented or prosecuted in collusion with the respondent.

- (3) The petition for divorce/judicial separation on the ground that the other party has, after the solemnization of the marriage, had voluntary sexual inter-course with any person other than his or her spouse, shall be supported by an affidavit to the effect that the petitioner has not, in any manner, been an accessory to or connived at or condoned the act or acts complained of.
- (4) The petition on the ground specified in clause (i) (a) of sub-section (1) of section 13 or on the ground of cruelty, shall be accompanied by an affidavit to the effect that the petitioner has not condoned the act complained of.
- (5) Every petition under clause (i) of sub-section (1-A) of section 13 of the Act, shall be accompanied by an affidavit made by the petitioner that there has been no resumption of co-habitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in the proceedings to which they were parties.
- (6) Every petition under clause (ii) of sub-section (1-A) of section 13 of the Act shall be accompanied by an affidavit made by the petitioner to the effect that there has been no restitution of conjugal rights as between the parties to the marriage or a period of one year or upwards after the passing of a decree for restitution of conjugal rights in the proceedings to which they were parties.”

The present case admittedly is not covered under sub rules (1), (3), (4), (5) and (6). It is only covered under sub rule (2) which requires that every petition, except petitions under Sections 11 and 13-B of the Act, shall be accompanied by an affidavit to the effect that it is not presented or prosecuted in collusion with the respondent. Admittedly, such affidavit has not been filed with the petition. The affidavit filed with the petition does not state that the petition has not been filed in collusion with the respondent. This, however, in my opinion, is not a sufficient ground to reject the petition itself, especially after the completion of the trial. The evidence led during the course of trial and the material placed on record clearly shows that the parties have not colluded with each other and in fact the respondent-wife has vehemently opposed and contested the petition. The learned trial court, in my opinion, gravely erred in holding that the case was covered under sub rule (4) of Rule 6. As stated above, the divorce was not sought on the ground of cruelty and, therefore, sub rule (4) was not applicable.

In **Satish Kumari Vs. Ranjit Singh, AIR 1997 HP 16**, the court was dealing with a petition in which

allegations of cruelty were levelled. In the petition there was total lack of pleadings of the separate acts of cruelty and no affidavit had been filed. It is in these circumstances that the court held that the petition was not filed under the rules. In a case where divorce is sought on the ground of cruelty the law is very well settled that every allegation of cruelty must be pleaded and proved. Therefore, the requirement of the affidavit becomes necessary. In case of desertion, the only affidavit required was that the petition had not been filed in collusion with the respondent. This, in my view, was a mere irregularity and could have been cured. The decision of the learned trial court on this issue is set aside.

Coming to the question of desertion, it would be pertinent to refer to the statements of the witnesses.

The husband has repeated the facts stated in the petition and has submitted that after the matter was settled in the High Court, the respondent-wife stayed with him only for about **2½** months and thereafter started going to her paternal house against his wishes. He states that on 18th July, 1998, after he had left for duty, the wife left the matrimonial home at about 9.00 a.m. without informing anybody. At about 3.00 p.m. when his son did

not come back from school, then his younger brother, Dalip Kumar, came to his office and told him that his son had not come back. The husband thereafter lodged a report with the police. The husband further states that he went to the parental house of the wife on 25th July, 1998 to bring her back alongwith the Vice President, some villagers and Jeet Ram Lambardar, but the family members of the wife insulted him and the persons accompanying him. It is also his case that the wife refused to come back. He also states that he had not enjoyed matrimonial relationships with his wife ever since 1992 and he be granted divorce. In cross examination, he has admitted that from 1992 till the compromise in the High Court, the children were living with the wife. He has been cross examined with regard to the maintenance of wife and the children. He has also admitted in cross examination that on 18th July itself Leela Devi had lodged some report against him in the police station, but has stated that Leela Devi lodged the report after he had lodged the report regarding his son. He has denied the suggestion that he or his family members illtreated the wife after she came back.

PW-3, Prem Singh was the Vice President of the Gram Panchayat. He states that he alongwith other villagers and Mohan Singh had gone to the house of Leela Devi to bring her back. He has mentioned that Mohan Singh, Manohar Singh, Babu Ram, Bhoop Ram, Medh Ram, Shubh Dutt and Jeet Ram had also gone. However, Leela Devi refused to come back. He also states that the family members of Lela Devi misbehaved with the husband. In cross examination he has admitted that Mohan Singh is his uncle (Chacha). According to him the President of Gram Panchayat was Krishan Dutt, who is the maternal uncle of Mohan Singh. He states that he had gone not in the capacity of President of the Panchayat, but as a relative. He also stated that from Leela Devi's side, Krishan Dutt, Bhoop Ram, son of Atma Ram, Mohan Singh, Bhoop Ram, son of Mast Ram etc. were present.

PW-4 is Bhoop Ram, whose statement is to the similar effect that on 25.7.1998 they had gone to the house of Leela Devi to bring her back, but she refused to come back.

PW-5, Manohar Singh is the brother of the husband. According to him the wife left the matrimonial

home of her own accord and when the husband alongwith other family members went to call her back on 25th July, 1998, she refused to come back.

PW-6 Constable Vikram Singh has proved the report No.35 (Ex.PW-6/D) lodged by Mohan Singh with the police on 18.7.1998 at about 6.00 p.m. in which it has been stated that till about 4.30 p.m. his son had not come from school and his wife had gone away without informing anybody.

RW-1 Sewak Ram is the uncle of the wife. According to him, the husband made no efforts to take back the wife, whereas he tried to tell the husband to take her home. In cross examination he has expressed his ignorance about the previous divorce proceedings. He admits that on 18.7.1998 the wife left the house of the husband and came to her parental house. He also admits that in the year 1998 Mohan Singh had come to the parental house of Leela Devi to take her back.

Respondent No. 2 is the wife, Leela Devi. According to her, after the orders of the High Court she joined the company of her husband and stayed there for 8-9 months. Thereafter the husband started beating her and was not maintaining her. According to her she was

kept in a separate room and nobody used to talk to her. She was not allowed to meet her children. She states that in the month of July, 1998, she was badly beaten by her husband and she was thrown out of the house. Thereafter she came back to her parents' house. In cross examination, she has denied the suggestion that she left the house of her own accord. According to her, she was thrown out of the house. She has also denied the suggestion that on 25.7.1998 the husband alongwith some other persons had come to take her back to her matrimonial home. She has denied the suggestion that she was being maintained by the husband.

RW-3, Krishan Dutt Verma, is related to both the parties. According to him, in 1998 the wife's father had called him to his house since he was the Pradhan of the area. A number of other people were present there. At that time the husband had asked for divorce and the wife did not agree to grant divorce. According to him, the wife wanted to go with the husband.

RW-4 Prem Singh is the brother of the wife. According to him the husband and his family members used to illtreat the wife. He states that the husband

accompanied by other persons visited their house and had stated that they want divorce which they had refused.

This is the entire evidence on record.

From the evidence and the pleadings, it is clear that the wife left the matrimonial home on 18.7.1998. She has filed a lengthy written statement and in the written statement, everywhere she has stated that she was illtreated and was denied articles of bare necessities. She has also stated that she was treated like an unwanted person and, therefore, she had no option, but to leave the matrimonial home. It would be pertinent to mention that in the written reply, there is no allegation that the husband had beaten her on 18.7.1998. However, while appearing in court, the wife states that on 18.7.1998 the husband had beaten her and she was thrown out of matrimonial home. These two stands are contradictory. In my considered opinion, it stands proved that the wife left the matrimonial home on 18.7.1998 of her own accord.

The next question which arises is whether she had any reasonable cause to leave the matrimonial home. In this behalf other than the statements of the wife and her brother, there is no evidence of any independent witness that the wife was illtreated or not provided

maintenance in the matrimonial home. Keeping in view the long standing disputes between the parties and the strained relationships between them, it is difficult to believe the sole version of the wife. If she had been maltreated and beaten up, as alleged by her prior to the incident, some report would have been lodged by her or her family members with the village Panchayat or some other elders of the village and the Biradri. PW-1, Sewak Ram, does not make any mention about any such complaint having been made to him prior to her leaving the house. Even RW-3, Krishan Dutt, who is related to both the parties has not stated that prior to July, 1998 the wife had ever complained about illtreatment to him. It appears that this story of illtreatment has been raised only to counter the allegations made in the petition for grant of divorce.

I also find in the present case that there is material on record to show that the husband had made attempts within one week of the wife leaving the home to bring her back to matrimonial home. The statement of the husband is supported by the other witnesses. The fact that such meeting took place is not denied by the wife or her witnesses. However, according to them, the husband

had not come to take back the wife home, but his intention was only to get divorce.

PW-3 Prem Singh is not related to either of the parties. Similarly, PW-4, Bhoop Ram is also not related to any of the parties. These two witnesses as well as Manohar Singh, brother of the husband, have clearly stated that they had gone to get the wife back. Sewak Ram states that he is not aware about the meeting on 25.7.1998 and the only independent witness produced by the wife is Krishan Dutt, who is related to both the parties. He has admittedly appeared as a witness for the wife in other cases also. The respondent has not produced any of the other independent witnesses, who were present to disprove the allegations of the husband.

While considering the case, it would not be unreasonable to consider the fact that except for a short period of about 4 months after the matter was compromised in this court, the husband and wife have not lived together since 1992. The children by now are grown up.

In view of the above discussion I am of the considered opinion that the husband has proved that the wife left her matrimonial home without any reasonable

cause. It has also been proved that despite efforts made by the husband she did not come back. The finding of the trial court on this issue is set aside.

As a result of the above discussion, the appeal is allowed, the impugned judgment and decree passed by the learned trial court is set aside and the petition of the husband for grant of divorce is allowed and the marriage solemnized between the parties on 10.5.1986 is dissolved by granting a decree for divorce in favour of the husband.

No costs.

December 28, 2006(K)

(Deepak Gupta),J.